86-163

No.

Supreme Court, U.S.
FILED
AUG 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

CHARLES BRIGGINS,

Petitioner,

against

THE POLICE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review.

Whether the statute here, New York State Public Officers Law §30(1)(e), is unconstitutional in its application to Petitioner because its mechanical operation has extinguished Petitioner's property interest without due process of law, where upon reversal of Petitioner's conviction of a felony upon grounds of being blameless of any wrongdoing, Petitioner was deprived of reinstatement to his position as a Police Officer in the City of New York, or of an evidentiary hearing on the question of his reinstatement.

List of Interested Parties.

Counsel of record for Charles Briggins certifies that the following parties have an interest in the outcome of this case.

1. The Police Department of the City of New York, represented by Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, 100 Church Street, New York, New York 10007.

2. The City of New York, represented by Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, 100 Church Street, New York, New York 10007.

3. Solicitor General
   Department of Justice
   Washington, D.C. 20530

4. Attorney General
   State of New York
   State Campus
   Albany, N.Y. 12207

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Reasons for Granting Writ of Certiorari:

The statute here, New York State Public Officers Law §30(1)(e), is unconstitutional in its application to Petitioner because its mechanical operation has extinguished Petitioner's property interest without due process of law, where upon reversal of Petitioner's conviction of a felony upon grounds of being blameless of any wrongdoing, Petitioner was deprived of reinstatment to his position as a Police Officer in the City of New York, or of an evidentiary hearing on the question of his reinstatement 12

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI.

Petitioner, Charles Briggins, prays for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered in these proceedings on May 6, 1986, which affirmed an Order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered in these proceedings on August 8, 1985, which reversed a Judgment of the Supreme Court of

the State of New York, New York County, entered in these proceedings on December 12, 1983, which granted a Petition, brought pursuant to New York State Civil Practice Law and Rules Article 78, to the extent of remanding the controversy to Respondents for a Departmental hearing on the question of Petitioner's reinstatement to the Police Department.

Opinions Below.

The Memorandum of the Court of Appeals and the dissenting opinion by the Hon. Stuart Hancock, Jr., Associate Justice of the Court of Appeals, which affirmed the Order by the Supreme Court, Appellate Division, First Judicial Department appears at pages A1 and following of the attached Appendix. The Decision has been officially reported at 67 N.Y.2d 965 (1986).

The Order and Decision of the Supreme Court of the State of New York, First Judicial Department, which reversed the Order of Supreme Court, New York County, appears at pages B1 and following of the attached Appendix. The Decision has been officially reported at 112 A.D.2d 827 (1st Dept. 1985).

The Order and Memorandum Decision of the Supreme Court of the State of New York, County of New York, dated December 12, 1983, which granted the Petition brought pursuant to New York State Civil Practice Law and Rules Article 78, to the extent of remanding the controversy to Respondents for a Department hearing on the question of Petitioner's reinstatement to the Police Department appears at pages C1 and following of the attached Appendix. The Decision has been officially reported at 122 Misc.2d 1026 (Sup.Ct., N.Y. Co., 1983).

Jurisdiction.

The final order of the Court of Appeals of the State of New York in this matter was entered on May 6, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). This Court has jurisdiction of the controversy because it involves a ". . . title, right privilege or immunity . . . specially set up or claimed under the Constitution, treaties, statutes of, or commission held or authority exercised under the United States." 28 U.S.C. §1257(3).

Statutory Provision Involved.

Section 30(1)(e) of the Public Officers Law of the State of New York provides:

> §30. Creation of vacancies
>
> 1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:
>
> * * *
>
> e. His conviction of a felony, or a crime involving a violation of his oath of office.

Statement of the Case.

A. The Incident and Petitioner's Arrest

On September 26, 1966, Petitioner was appointed a Police Officer in the New York City Police Department.

At a subsequent date, Petitioner was promoted to the rank of Detective.

In addition, at a subsequent date, Petitioner became additionally employed as a part-time clothing salesman. For reasons not really relevant to this case, Petitioner desired to keep his supplemental earnings as a part-time clothing salesman from his wife. In order to do so, Petitioner assumed an additional identity by adopting a name Garry Morris. He associated the name with the address of a cooperating friend.

To further assist the establishment of this second identity, Petitioner opened a checking account at the Long Island Trust Company under the name of Garry Morris. Petitioner also used this name to obtain a temporary motor vehicle operator's permit and to apply for a permanent driver's license.

On March 1, 1975, Petitioner went shopping in several stores located in the Shoppe Village shopping center at 511 Montauk Highway, West Babylon, New York. He purchased merchandise from three separate stores in the shopping center. Petitioner utilized three checks totalling $261.91, which he drew on the checking account at the Long Island Trust Company, in order to pay for the merchandise.

Apparently, one of the merchants became suspicious of Petitioner because, when he examined one of the checks, he thought that the blank on which it was made was a xerox copy of a check rather than an original. The merchant, it was later ascertained, was wrong in this suspicion.

The merchant contacted a security guard, who was an off-duty Suffolk County Police Officer, on his second job. The security guard approached Petitioner and demanded Petitioner surrender his purchases and submit to an investigation. Petitioner demurred and questioned the security guard's authority. A physical struggle resulted, after which Petitioner was arrested.

Upon his arrest, it was ascertained that Garry Morris was in fact Charles Briggins. In addition, the driver's permit and application for driver's license were also seized.

B. The Criminal Case against Petitioner

In due course, a 13 count indictment was filed against Petitioner. Among other things, Petitioner was indicted for assault, forgery of the checks given to the merchants under the signature of Garry Morris, larceny of the merchandise purchased with the checks, possession of four checks drawn to the order of Garry Morris and the two counts of criminal possession of a forged instrument, relating to the driver's permit and the application for the driver's license, for which Petitioner was ultimately convicted. In addition, Petitioner made a complaint against a second Suffolk County Police Officer for taking, without permission, $50.00 from Petitioner, for which the Suffolk County Police Officer was found guilty and disciplined. Petitioner also made a brutality complaint against the arresting officer from the Suffolk County Police Department, who, in turn, sued Petitioner for defamation of character. Petitioner also sued the County of Suffolk for damages.

The trial court dismissed the counts of the indictment relating to forgery of the checks. The trial jury found Peti-

tioner not guilty of all of the rest of the counts of the indictment, except the two counts of criminal possession of a forged instrument relating to the motor vehicle licensing.

Petitioner appealed his conviction to the Supreme Court, Appellate Division, Second Department which was affirmed by a divided Court. (See *People v. Briggins,* 67 AD2d 1004 [2d Dept., 1979]). The matter was appealed to this Court where Petitioner's conviction was unanimously reversed and the indictment dismissed. (See *People v. Briggins,* 50 N.Y.2d 302 [1980].)

In reversing the conviction, this Court held that Petitioner committed no crime in signing his name "Garry Morris" to the two documents. Petitioner did not simulate, alter, erase or obliterate another person's signature. Instead, Petitioner was held to have merely used an adopted name, as for example, Samuel Clemens used the name Mark Twain, or Mary Ann Evans used that of George Eliot. Moreover, Petitioner did nothing to cause anyone who relied on the instrument to believe that Garry Morris was anyone other than Petitioner. In short, the Court saw no falsehood or "mens rea," in Petitioner's actions, and reversed the conviction.

A concurring opinion held that the indictment should be dismissed because there was no proof of Petitioner having a fraudulous intent.

C. Petitioner's Attempt to Rejoin the Police Department

Contemporaneous with the indictment, Petitioner was served with Departmental Charges and Specifications relating to the incident. They read as follows:

1. Said Det. Briggins, off duty at about 1930 hours to 2100 hours, Saturday, March 1, 1975, at Shoppe Village, 511 Montauk Highway, West Babylon, New York, did knowingly and wrongfully utter three forged checks in the amounts of $80.90, $56.02 and $125.89 in said premises; appropriate sum of money in the amount of $262.81 for his own use.

Patrol Guide 104-1, page 2, para. 1, subd. C
Patrol Guide 104-1, page 2, para. 3--CONDUCT

2. Said Det. Briggins, at time, date and location indicated did knowingly and wrongfully falsely identify himself as one Garry Morris.

Patrol Guide 104-1, page 2, para. 1—PUBLIC CONTACT
Patrol Guide 104-1, page 2, para. 3—CONDUCT.

At Petitioner's conviction of the two felonies, by operation of law, specifically Public Officers Law §30(e), he was terminated from the New York City Police Department. Because of this termination, the above mentioned Charges and Specifications became moot and were filed by the Department.

Upon the reversal of the conviction, Petitioner sought reinstatement to the Police Department, by means of making an application. On September 29, 1980, Petitioner's contentions with respect to his application for reinstatment were set forth to the Police Department's Chief Hearing Officer, Arnold N. Kriss. The Hearing Officer rendered a Report and Recommendation on December 11, 1980. In this report, while the Hearing Officer admitted

that if Petitioner were to be tried administratively, the Charges and Specifications would have to have been dismissed as being legally insufficient unless new subject matter were amended into the charges.

The Hearing Officer, however, stated that the Police Department was in possession of information that Petitioner was in possession of several unendorsed checks which had been reported missing from a burglary within a precinct in which Petitioner had been stationed. Although Petitioner had never been accused of any impropriety in connection with the checks, the Hearing Officer utilized the situation to recommend to the Police Commissioner that Petitioner not be reinstated to the Police Department, that he not be afforded a trial on the Departmental Charges and Specifications and that he not even receive a "name clearing" hearing with regard to this matter.

On July 16, 1981, the Police Commissioner approved the recommendation in its entirety. Petitioner instituted the present Article 78 petition seeking reinstatement to the Police Department or a hearing in the alternative. The Article 78 petition was duly opposed.

D. The Decisions in Supreme Court, New York County

The first line of defense by the City of New York to the petition was to make a motion to dismiss the petition on the grounds that 1) the claim was time barred, and 2) the provisions of the Public Officers Law, as a matter of law, precluded a police officer's reinstatement to the Department even upon reversal of a conviction.

Supreme Court at Special Term denied the motion to dismiss the petition and directed that an answer be filed to

the petition. (See *Briggins v. McGuire,* 114 Misc.2d 687 [Sup.Ct., N.Y. Co., 1982].) The Court held that, because any attempt by a convicted police officer to be reinstated prior to a reversal of a conviction would have been futile, the time limitation only began to run "after the determination to be reviewed has become final and binding" (citing CPLR §7801).

The Court also refused to hold that Public Officers Law §30 mandated preclusion, as a matter of law, of a police officer's reinstatement to the Department upon reversal of a criminal conviction (citing *Greene v. McGuire* in the United States District Court at 517 F.Supp. 1330 [S.D.N.Y., 1981]).

The City of New York made a motion to reargue the Court's decision, especially the branch of the Court decision dealing with the operation of Public Officers Law §30 here. Upon reargument, the Court modified its original determination. It was held that a police officer who was convicted of a felony and was therefore automatically terminated pursuant to the Public Officers Law, had a property and liberty interest in his employment prioir to his dismissal. This interest meant that, upon a reversal of a criminal conviction on the grounds that no crime had in fact been committed, the police officer was entitled to a post termination reinstatement hearing. The Court, however, also held that a police officer in such a situation, was not entitled to automatic reinstatement by Court Order prior to the determination after the hearing. The Court's decision was supported by a lengthy discussion of *Greene v. McGuire,* which, between this decision and the previous decision, had been reversed by the Court of Appeals, Second Circuit. (See 683 F.2d 32 [2d Cir., 1982].) In sum, Supreme Court at Special Term held that the Second

Circuit had erred in its interpretation of New York law. (See *Briggins v. McGuire,* 118 Misc.2d 964 [Sup.Ct., N.Y. Co., 1983].)

The City of New York, as per the Court's direction, filed an answer to the Article 78 petition. Petitioner moved to restore the matter to the calendar and asked the Court for a determination on the merits.

The Court held that Petitioner was entitled to a Departmental hearing on the issue of reinstatement. (See *Briggins v. McGuire,* 122 Misc.2d 1026 [Sup.Ct., N.Y. Co., 1983].)

An appeal by the City of New York and the New York City Police Department ensued.

E. The Order of the Appellate Division

On appeal to the Appellate Division, Respondents argued that upon his conviction of a felony, and regardless of any subsequent reversal of that conviction, Petitioner's position as a Police Officer was automatically vacated by operation of the statute and that therefore, his right to a proprietary interest in that position had been extinguished. Therefore, Petitioner, according to Respondents, was not entitled to reinstatement nor to a disciplinary hearing.

Petitioner argued to the contrary. It was submitted in his brief that the fact that he was found to be factually innocent of wrongdoing by the Court of Appeals, as a matter of fact as well as a matter of law, precluded the mechanical operation of Public Officers §30(e). Moreover, it was urged that this Court's decision in *Toro v. Malcolm,* 44 N.Y.2d 146 (1978) was not controlling under the circumstances present, because of Petitioner's factual innocence. In addition, it was argued that the deci-

sion by the United States Court of Appeals, Second Department, *Greene v. McGuire,* 683 F.2d 32 (2nd Cir., 1982), reversing 517 F.Supp. 1330 (S.D.N.Y., 1981) was also distinguishable, or to the extent it was controlling, the case was incorrectly decided.

In a Memorandum Decision, the Supreme Court, Appellate Division reversed the Order of Supreme Court, New York County, largely for the reasons stated by Respondents. Petitioner duly appealed to the Court of Appeals of the State of New York.

In that Court, the majority upheld the constitutionality of the statute. The Court held that the operation of the statute must be interpreted as being in harmony with constitutional principles and that it was in conformance with the plain meaning of the words which made it up.

The Court noted that the statute had been enacted and maintained in substantially the same form for nearly 100 years. In addition, the Court stated that since the decision in *Toro v. Malcolm, supra,* the Legislature of the State of New York had ample opportunity to amend the statute in order to carve out a statutory exception in cases of wrongful conviction of civil servants and public officers, but had not done so, a circumstance that the majority of the Court found significant.

The dissenters in the Court of Appeals of the State of New York disagreed. They believed that, as Petitioner was granted a property interest in his position by New York State law, he was entitled to a reinstatement hearing under the due process guarantee contained in the United States Constitution, especially under the circumstance where it

had been determined that he had been convicted of conduct which was not a crime.

The dissenting opinion stated that the interpretation of the statute as made in the majority opinion was incorrect because the "crucial event," the conviction of a felony, had not happened. Because Petitioner's conduct, which was under scrutiny, not only was not a felony, but was not even criminal, the interpretation of the majority constituted a misreading of the original intention of the Legislature.

The dissent believed it to be "fundamentally unfair that a tenured Civil Service office holder should be totally divested of all rights in his position for conduct which was not criminal." *Briggins v. McGuire,* 67 N.Y.2d at 972.

Petitioner now moves this Court for the granting of his Petition for a Writ of Certiorari.

REASONS FOR GRANTING WRIT OF CERTIORARI.

The statute here, New York State Public Officers Law §30(1)(e), is unconstitutional in its application to Petitioner because its mechanical operation has extinguished Petitioner's property interest without due process of law, where upon reversal of Petitioner's conviction of a felony upon grounds of being blameless of any wrongdoing, Petitioner was deprived of reinstatement to his position as a Police Officer in the City of New York, or of an evidentiary hearing on the question of his reinstatement.

It is submitted that the United States Constitution requires that the Order of the Court of Appeals of the State of New York should be reversed, and this controversy

remanded to the Courts of the State of New York for further proceedings, with a view to granting Petitioner either reinstatement to his former Civil Service position of Police Officer, or in the alternative, granting him an evidentiary hearing on the question of his reinstatement. It is further submitted that the majority of the Court of Appeals erred in affirming the Order of the Supreme Court, Appellate Division of the State of New York.

The key question, overlooked by the majority of the Court below was whether Petitioner, possessing Civil Service tenure, had a property interest in his position. See *Economico v. Village of Pelham,* 50 N.Y.2d 120 (1980).

Under the circumstances present, it is clear that Petitioner did have a property interest in his position. According to New York law, Petitioner, as a tenured civil servant, has a recognized and protected "property interest" in his continued employment and in all the rights and privileges appertaining thereto. See New York State Civil Service Law §75. This "property interest" may not be extinguished by a governmental agency employing the civil servant, unless the agency provides the civil servant with notice for the reasons for its extinguishment and an opportunity to present his case. In short, the civil servant is entitled to due process requirements. *Economico v. Village of Pelham, supra; Board of Regents v. Roth,* 408 U.S. 564 (1972); *Perry v. Sindermann,* 408 U.S. 725 (1972).

According to the statute in question here, and as relevant, Public Officers Law §30(1)(e), a civil servant's position is automatically vacated upon his conviction of a felony. Petitioner was convicted of certain felonies. However, the New York State Court of Appeals reversed his conviction for those felonies, specifically finding that

Petitioner, by his conduct, had committed no crime. Because Petitioner had not committed a crime, and his conviction had been set aside on this basis, he was entitled to be placed in the same situation that he was in prior to his erroneous conviction. See *People v. Nitzberg,* 289 N.Y. 523 (1943).

The application by the Courts of the State of New York of Public Officers Law §30(1)(e) in a mechanical manner and with absolute effect, even though Petitioner had not been convicted of a felony, was wrong and violative of Petitioner's due process rights. For this reason, Petitioner asks the Court to intercede on his behalf, grant the present petition and ultimately reverse the orders of the Courts of the State of New York.

It is submitted that two previous cases have caused great misfortune to those civil servants whose criminal convictions had been reversed on grounds of factual innocence. It is submitted that where, as in the case of the Petitioner, a criminal conviction was obtained and later set aside, federal constitutional law, as well as New York law, must be construed to restore the affected civil servant to the position he held prior to his illegal conviction.

Unfortunately for Petitioner, the two previous cases, *Toro v. Malcolm,* 44 N.Y.2d 146 (1978) and *Greene v. McGuire,* 683 F.2d 32 (2nd Cir. 1982), reversing 517 F.Supp. 1330 (S.D.N.Y., 1978), which the New York Courts have found controlling, each involved civil servants whose criminal convictions were reversed on legal technicalities, rather than on the facts presented. Because of these circumstances, the civil servants involved being of less than clean hands, the two Courts were reluctant to permit their reinstatement.

By contrast, the case at bar involved a guiltless person, wrongfully convicted. The New York Court of Appeals reversed Petitioner's conviction after an analysis of the facts presented. Pursuant to New York State Criminal Procedure Law §470.20, the accusatory instrument against Petitioner was dismissed on that review. No "legal technicality" or "legal fiction" was employed to declare Petitioner innocent of wrongdoing here.

Therefore, by operation of New York law, a reversal of a criminal conviction places a defendant in the same position he was prior to his conviction. See New York State Criminal Procedure Law §§ 470.20 and 470.55. Petitioner, as a civil servant, stands entitled to the benefits and protections of these statutes.

The two cases cited, *Toro* and *Greene,* are inapposite to the present controversy. The Supreme Court, New York County recognized, in its opinion (118 Misc.2d 964), that *Toro* was distinguishable from the present fact pattern. *Toro* involved a correction officer who was convicted of a felony. His office was vacated pursuant to §30(i)(e) upon conviction. Subsequently, his conviction was reversed on a legal technicality in no way indicative of his innocence. Nevertheless, the Department of Correction voluntarily reinstated the officer. He then commenced an action to recover back pay. The sole issue in *Toro* was whether the voluntarily reinstated officer was entitled to back pay for the period between his conviction and his reinstatement.

With respect to the issue presented by the present case, in *Toro,* the Court of Appeals stated *in dicta* that it was opposed to a general rule that would entitle a civil servant whose conviction is reversed, regardless of the ground for reversal, to automatic reinstatement with back pay.

The Court of Appeals, *in dictum,* indicated sympathy to the plight of a truly innocent civil servant, unjustly accused and convicted, but declined, under the fact present in *Toro* to establish a general rule of relief to "provide unjustified relief to others not equally deserving." *Toro* at 151.

Petitioner argued to the Court of Appeals that *Toro* appeared to leave open a possibility to afford relief to those who were deserving to reinstatement, on a case-by-case basis, and attempted to convince the Court that Petitioner was worthy of such consideration. The majority of the Court of Appeals declined to follow Petitioner's argument, stating that:

> In fashioning this broad rule, we expressed sympathy with the 'plight of a truly innocent officer unjustly accused and convicted,' but nonetheless interpreted the statute in conformance with its plain meaning in the manner most suitable to effectuating the Legislature's intent [*Toro* at 150].

The dissenters disagreed with this interpretation, and it is suggested that this view was the more correct one.

The decision of the Court of Appeals, Second Circuit, in *Greene v. McGuire, supra,* does not compel the Court to find that a police officer whose felony conviction was reversed on the grounds that no crime had in fact been committed is not entitled to an otherwise statutorily required hearing. In the decision by Supreme Court, New York County, reported at 118 Misc.2d 964, the Court below stated that there was justification to believe that the Court of Appeals, Second Circuit, impermissibly extended *Toro v. Malcolm, supra,* in an erroneous manner. The

Court below held that sitting as Supreme Court, Special Term, it, as a State Court, was not compelled to follow an incorrect interpretation of State law by a Federal Court.

Whether or not the Supreme Court, New York County was correct that the Court of Appeals, Second Circuit, incorrectly decided *Greene* is in the considered opinion of Petitioner not germane to this controversy. It is urged by Petitioner that the facts in *Greene* are sufficiently different from those in the present case, as to render the result in *Greene* to be distinguishable from the present case.

In *Greene,* two police officers were convicted of a felony based solely on the testimony of accomplices without corroboration. The convictions were reversed on a legal technicality, that their convictions could not stand without necessary corroborative evidence. At their request for reinstatement, the Police Department stated that not even a hearing was necessary because:

> . . . accomplice testimony would have been sufficient in a departmental hearing to justify their dismissal.

The Police Department in *Greene* contended that since there was no dispute as to the facts there was no need to hold a departmental hearing in accordance with due process requirements.

The Second Circuit, in reversing the District Court, agreed with the position of the New York City Police Department, relying upon Public Officers Law §30(1)(e), when read together with *Toro v. Malcolm, supra,* and *Bishop v. Wood,* 426 U.S. 341 (1976).

As already stated, Petitioner maintains that *Toro v. Malcolm* is not controlling in the instant action. Nor is *Bishop v. Wood, supra,* pertinent here. In *Bishop,* the discharged civil employee was not a permanent civil servant, and was not under the protection of the Civil Service Law, nor of any other similar statute. The discharged civil servant in *Bishop* simply had no property interest in his former position before he was discharged, and did not even have as much as an arguable claim.

Toro and *Greene* involved police officers whose convictions were reversed on legal technicalities, in no way indicative of their innocence. The evidence against the officers involved would have been sufficient to warrant their dismissal after a departmental hearing, because of the fact that, in each case, the civil servant was guilty of some degree of moral turpitude, if not actual criminal activity. Furthermore, there were no facts in dispute in any of those cases. The instant action, by contrast, involves a permanently appointed police officer who was wrongfully accused and convicted.

In sum, it was fundamentally unfair that Petitioner, under the present circumstances, was not afforded his due process rights to his Civil Service position as a New York City Police Officer. The statute in question, as construed by the Courts of the State of New York, has denied Petitioner constitutional rights by depriving him of a property interest in his Civil Service position without an opportunity to prove "the legitimacy of his claim." *Briggins v. McGuire,* dissenting opinion at p. 972, citing *Perry v. Sindermann, supra,* at p. 603.

Conclusion.

For the reasons stated above, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Certificate.

JOHN J. MAGUIRE hereby certifies that he is a member of the bar of the Supreme Court of the United States and states that three copies of the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York were mailed postpaid first class mail to each of the following:

Frederick A. O. Schwarz, Jr.,
Corporation Counsel of the City of New York,
100 Church Street, New York, N.Y. 10007

Solicitor General of the United States
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Washington, D. C. 20530

Attorney General of the State of New York
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Albany, New York 12207

by depositing same in a United States Post Office at 90 Church Street, New York, N.Y. 10007 with first class postage prepaid and that forty copies were deposited in a United States Post Office at 90 Church Street, New York, N.Y. 10007 with first class postage prepaid and properly addressed to The Clerk of the Supreme Court of the United States, Supreme Court Building, One First Street, N.E. Washington, D. C. 20543.

JOHN J. MAGUIRE

Sworn to before me this
30th day of July, 1986
Roland W. Johnson
Notary Public, State of New York

No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1987

Appendix A—Memorandum Decision of the Court of Appeals of the State of New York.

COURT OF APPEALS

STATE OF NEW YORK.

IN THE MATTER

OF

CHARLES BRIGGINS,

Appellant,

v.

ROBERT MCGUIRE, as Police Commissioner of the Police Department of the City of New York, *et al.*,

Respondents.

(54), Raymond E. Kerno & Richard Hartman, Little Neck, for appellant.

Frederick A.O. Schwarz, NYC Corporation Counsel (Edward F.X. Hart & Larry Sonnenshein of counsel) for respondent.

MEMORANDUM

The order of the Appellate Division should be affirmed, with costs.

Constitutionally protected property rights in a public office "are created and their dimensions defined" by, among other things, state law (*Board of Regents v. Roth,* 408 US 577; *Greene v. McGuire,* 683 F2d 32, 34). While this State's Civil Service Law certainly creates a protected property interest in a police officer's position, Public Officers Law § 30(1)(e) mandates that a public office automatically becomes vacant upon an officer's "conviction of a felony". This provision was enacted substantially in its present form nearly 100 years ago (L 1892, c 681), and we held early on that its "application * * * is not defeated by the possibility that the judgment [of conviction] may be reversed" (*Matter of Obergfell,* 239 NY 48, 50).

Upon a more recent examination of the statute in light of a dismissed correction officer's application for back pay following an appellate reversal of his felony conviction, we noted that "[t]he directive contained in section 30 of the Public Officers Law is clear and unqualified: every public office becomes *vacant* upon the officer's conviction of a felony. A conviction of the incumbent constitutes an abridgement of the office, automatically terminating its duration. (*Matter of Obergfell,* 239 NY 48, 50 [*supra*]; *Matter of Breslin v. Leary,* 35 AD2d 794, 795; see, generally, McQuillin, Municipal Corporations, pp 432-433.)" (*Matter of Toro v. Malcolm,* 44 NY2d 146, 149-150 [emphasis in original]). We attributed the statute's absolute effect to "a legislative decision borne out of the recognition that a public officer's conviction of a felony does not permit cessation of governmental functions for

the period required to exhaust the appellate process. Continued performance of governmental functions necessitates the existence of a point in time at which the affected office may be filled without concern for the possibility that at some future date a former officer's conviction may be reversed" (*id.* at p 150). In fashioning this broad rule, we expressed sympathy with the "plight of a truly innocent officer unjustly accused and convicted", but nonetheless interpreted the statute in conformance with its plain meaning in the manner most suitable to effectuating the Legislature's intent (*id.*).

Since the decision in *Toro,* the Legislature has not seen fit to alter the law in this area as formulated by the courts or to carve out a statutory exception in cases where a public officer has been wrongfully convicted. We cannot agree with our dissenting colleague that this is a different case in any meaningful sense. Petitioner was "convicted of a felony." At that point his position was terminated and under state law he no longer had a protectable property interest in the office that would mandate a reinstatement hearing (*Greene v. McGuire,* 683 F2d 32, *supra*).

HANCOCK, JR., J. (dissenting):

In our view, New York law and the Federal Constitution require that the Appellate Division order be reversed. We agree with Special Term that petitioner Briggins has a constitutional right to a departmental reinstatement hearing.

The question, we emphasize, is not whether Briggins' position with the New York City Police Department became vacant under the Public Officers Law upon his conviction of what was then assumed to be a crime. The question is whether Briggins, a detective with Civil Service tenure (*see, Economico v. Vil. of Pelham* [50 NY2d 120, 125, 126]), had a property interest in his position—as

determined by New York law—which entitled him to a reinstatement hearing under the due process guarantee of the Federal Constitution, when it was determined that he had been convicted of conduct which was *not a crime* (*see, Bishop v. Wood,* 426 U.S. 341, *Perry v. Sindermann,* 408 U.S. 593; *Bd. of Regents v. Roth,* 408 U.S. 564; *Economico v. Vil. of Pelham, supra,* at pp 125, 127). We conclude that he had such an interest.

In 1975 a jury found Briggins guilty of two counts of criminal possession of a forged instrument in the second degree. He had obtained a temporary motor vehicle operator's permit and a license application and signed them with a pseudonym—presumably adopted to conceal from his wife the earnings he derived from a part-time job. As a result of the conviction, Briggins' position became automatically vacant by operation of Public Officers Law §30(1)(e). On May 6, 1980, this Court unanimously held that the documents did not constitute forged instruments, that their possession was not a violation of the Penal Law, and that Briggins' actions were not criminal. Applying "the fundamental principle that a person cannot be found criminally liable for conduct which *does not constitute a crime*" (*People v. Briggins,* 50 NY2d 302, 309 [emphasis added]), we reversed the Appellate Division's order affirming Briggins' conviction and dismissed the indictment.

Following our decision, Briggins applied for reinstatement and, when the department refused, he commenced the instant CPLR article 78 proceeding. Special Term found that he was not entitled to automatic reinstatement but held that, as a matter of law, he was entitled to a departmental reinstatement hearing. The Appellate Division, citing *Greene v. McGuire* (683 F2d [2d Cir] 32), reversed and dismissed Briggins' petition. It held that "all rights to the office disappeared" at the time of the convic-

tion, and that denial "of a hearing in conjunction with petitioner's application for reinstatement deprived him of neither liberty nor property, thus negating any claims with regard to constitutional due process." The majority has adopted that decision.

Whether a particular public office creates a constitutionally protected property interest in the holder is, of course, a matter of state law (*see, Bd. of Regents v. Roth, supra,* at p 577; *Economico v. Vil. of Pelham, supra,* at p 125; *Matter of Petix v. Connelie,* 47 NY2d 457, 459). Under New York law, Briggins, a permanent appointee in the classified Civil Service, unquestionably had a protected property interest in his position (*see,* Civil Service Law §§58, 75; *Economico v. Vil. of Pelham, supra,* at p 125), albeit subject to Public Officers Law §30(1)(e)—i.e., to the offices becoming vacant if the incumbent should be *convicted of a felony (see, Economico v. Vil. of Pelham, supra,* at p 127).

Here, however, the Appellate Division has applied Public Officers Law §30(1)(e) with absolute effect even though the incumbent was not convicted of a felony. It has concluded that Briggins' property interest was totally extinguished as a result of his conviction for conduct which, we have specifically held, was *not a crime at all (People v. Briggins, supra,* at p 309), and that even his right to a reinstatement hearing has been lost. This construction is not permitted either by the plain wording of the statute or the dictates of common sense and fairness. Nor is such a harsh application of the statute necessary to further its purpose.

The Public Officers Law states in pertinent part:

> §30. *Creation of vacancies*
>
> 1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:
>
> e. His [the incumbent's] conviction of a *felony, or* a *crime* involving a violation of his oath of office; [emphasis added]

The language of the statute is unequivocal. "[U]pon an officeholder's conviction of a *felony,* that office becomes vacant by operation of law" (*Matter of Gunning v. Codd,* 49 NY2d 495, 500 [emphasis added]). Its purpose is equally free from doubt—not to punish the officeholder but to assure the public that its "officers are individuals of moral integrity in whom [it] may, without second thought, place [its] confidence and trust" (*Toro v. Malcolm,* 44 NY2d 146, 152). In giving effect to this plain meaning and undeniably important public purpose we have not hesitated to apply the statute literally.

Thus, we have held that the automatic vacatur of the position of an incumbent convicted of a felony will not be affected by a reversal on appeal because "one convicted of a *felony* shall not retain a post of honor" (*Matter of Obergfell,* 239 NY 48, 50 [emphasis added]). We have adhered to this literal application acknowledging that there could be cases where "an innocent officer is unjustly convicted" (*Matter of Toro v. Malcolm, supra,* at p 151). The justification for our refusal to make exceptions to the categorical rule of automatic vacatur on felony conviction lies not only in the statute's clear language and public import, but also in two practical considerations—the ad-

visability of avoiding a precedent which could "provide unjustified relief to others not equally deserving" (*Matter of Toro v. Malcolm, supra,* at p 151), and "the recognition that a public officer's conviction of a felony does not permit the cessation of governmental functions for the period required to exhaust the appellate process" (*id.*, at p 150).

This strict enforcement of the statute—i.e., that "[e]very office *shall be vacant upon the happening* [of the incumbent's] conviction of a felony" (Public Officers Law §30[1][e] [emphasis added])—presupposes, of course, the happening of the crucial event—the conviction of a felony. Here, that has not happened. To apply the statute to Briggins' position one must conclude that the Legislature intended the words "conviction of a felony" to include convictions for conduct which was not felonious or even criminal. Such an interpretation is contrary to the accepted rule that the intent of a statute should be determined from the language used and should be given its natural and obvious meaning (*see,* McKinney's Statutes §94).

Nor can the policy considerations compelling automatic vacatur apply where an incumbent has been convicted for noncriminal conduct. The Legislature could, with good reason, "strike the balance" in favor of the public's interest in having officers of unquestioned "moral integrity", and against the interest of an incumbent who has been found by a trier of the fact to have committed acts constituting a felony (*see, Matter of Toro v. Malcolm, supra,* at pp 151, 152)—even when the conviction is later reversed. For it is reasonable to suppose that an incumbent, whom a jury has branded as a felon, is probably unfit for office. There is no basis for this assumption when the incumbent has been found guilty of conduct that is not a crime.

Clearly, that position does not conflict with *Matter of Toro v. Malcolm, supra.* There, the petitioner had been voluntarily reinstated and the sole issue before us was his entitlement to back pay. Here, the issue is *not* back pay or the vacatur of a public office, but a reinstatement hearing—i.e., whether the New York Legislature could have intended that Public Officers Law §30(1)(e) should be applied to deny Briggins a property interest sufficient to warrant due process protection (*see, Bishop v. Wood,* 426 U.S. 341, *Perry v. Sindermann,* 408 U.S. 593; *Bd. of Regents v. Roth,* 408 U.S. 541; *Economico v. Vil. of Pelham,* 50 NY2d 120, 125, 127; *see also, Greene v. McGuire,* 683 F2d [2d Cir] 32, 35). Also, of course, unlike Briggins, Toro was found guilty of authentically felonious conduct—burglary, petit larceny and impersonating a police officer—and his convictions were reversed for reasons not necessarily indicative of innocence (*Matter of Toro v. Malcolm, supra,* at p 149).[1] For the same reason,

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[1]Contrary to the majority's characterization of the holding in *Matter of Toro v. Malcolm,* this Court did not establish an inflexible rule precluding any relief for a public official whose conviction has been reversed, regardless of the circumstances. Rather, this Court simply refused "*to establish* a *general rule* which would provide *unjustified* relief" to undeserving officers (*Matter of Toro v. Malcolm, supra* at 151 [emphasis added]). Denying the specific relief requested under the facts of that case, the majority of the Court in *Toro* explained that "a general rule. . . that public officers whose convictions have been reversed be automatically reinstated to their former office *and awarded back pay,* would apply to all public officers whose convictions were reversed *regardless of the basis for the reversal* (*id.* [emphasis added]).

The position we urge is entirely consistent with that holding. We are, of course, not positing a "general rule", "regardless of the basis for the reversal", or that defendant is entitled to be "automatically reinstated" and "awarded back pay". We simply cannot agree that Public Officer's Law §30(1)(e) was ever intended to have the arbitrary effect which the majority holds is mandated in this case by *Matter of Toro v. Wilson.*

Greene v. McGuire, supra, involving convictions on various felony charges of bribery and conspiracy, is distinguishable.

In granting Briggins a reinstatement hearing we would not be holding that a hearing is required whenever an incumbent officeholder's felony conviction has been reversed on appeal as in *Matter of Toro v. Malcolm, supra* and *Greene v. McGuire, supra.* For, as explained, where the incumbent has been convicted of an actual felony, the Legislature could, for reasons of policy, have decided that there should be no remaining property interest in the position (*see, Economico v. Vil. of Pelham, supra,* at p 127). Absent a felony conviction, however, nothing in common experience or in the statutory purpose, and certainly nothing in the language of the statute itself, would justify that result.

The constitutional due process question presented depends upon this Court's delimitation of Briggins' property interest in his position under New York law—whether he had "a legitimate claim of entitlement to it" (*Bd. of Regents v. Roth,* 408 U.S. 564, 577) which he "may invoke at a hearing" (*Perry v. Sindermann,* 408 U.S. 593, 601). The essence of constitutional due process, we have held, "is fundamental fairness" (*Economico v. Vil. of Pelham, supra,* at p 125), and it may not be assumed that the Legislature ignored this basic concept in defining the property interest in circumstances such as Briggins' (*see, United States v. Jin Fuey Moy,* 241 U.S. 394, 401; *Dollar Co. v. Canadian Car & Foundry Co.,* 220 NY 270, 275-278; *see generally,* McKinney's Statutes §§143, 146, 150 to the effect that a statutory construction which is unreasonable, or works a hardship, or is unconstitutional should be avoided). It is fundamentally unfair that a tenured Civil Service officeholder should be

totally divested of all rights in his position for conduct which was not criminal. To assume that the Legislature intended that Public Officers Law §30(1)(e) should be given such uncalled-for effect would conflict with basic rules of statutory construction (*see*, McKinney's Statutes §§143, 146, 150) and with the plain language of the statute. If the Legislature did not so intend, then Briggins' residual interest in his position was sufficient to trigger the due process requirement of an opportunity to prove "the legitimacy of his claim" (*Perry v. Sindermann, supra*, at p 603).

Order affirmed, with costs, in a memorandum. Chief Judge Wachtler and Judges Simons, Kaye, Alexander and Titone concur. Judge Hancock dissents and votes to reverse in an opinion in which Judge Meyer concurs.

Decided May 6, 1986

APPENDIX B—Order and Decision of the Supreme Court, Appellate Division, First Judicial Department.

Order of Reversal.

At a term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, on August 8, 1985.

Present:
Hon. Theodore R. Kupferman,
Justice Presiding;
David Ross
Sidney H. Asch
Arnold L. Fein,
Justices.

IN THE MATTER OF THE APPLICATION
OF
CHARLES BRIGGINS,

Petitioner-Respondent,

For a Judgment Pursuant to Article 78 of the CPLR,

against

ROBERT MCGUIRE, as Police Commissioner of the Police Department of the City of New York, NEW YORK CITY POLICE DEPARTMENT and THE CITY OF NEW YORK,

Respondents-Appellants.

An appeal having been taken to this Court by the respondents-appellants from an order of the Supreme Court, New York County (Richard Price, J.), entered on or about December 12, 1983, which granted the petition of petitioner-respondent to the extent of remanding the matter to respondents-appellants for a departmental hearing on the question of reinstatement,

And said appeal having been argued by Edward F.X. Hart of counsel for appellants, and by Raymond E. Kerno of counsel for petitioner-respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same hereby is reversed, on the law, the petitioner's motion to restore this proceeding to the calendar for a determination on the merits is denied, and the petition is dismissed, without costs and without disbursements.

Enter:

FRANCIS X. GALDI
Deputy Clerk.

Decision of the Appellate Division, First Department.

Kupferman, J. P., Ross, Asch, Fein, JJ.

23238

IN RE

CHARLES BRIGGINS,

Petitioner-Respondent,

For a Judgment, etc.,

against

ROBERT MCGUIRE, etc., *et al.*,

Respondents-Appellants.

R. E. Kerno

E. F. X. Hart

Order of Supreme Court, New York County (Richard Lee Price, J.), dated December 12, 1983 (no evidence of entry; leave to appeal granted by Price, J. in an order entered April 17, 1984), granting the petition to the extent of remanding this matter to respondents for a departmental hearing on the question of reinstatement, unanimously reversed on the law, the petitioner's motion to restore this

proceeding to the calendar for a determination on the merits is denied, and the petition is dismissed, without costs.

Petitioner joined the New York City Police Department in September 1966, and was later promoted to the rank of detective. In order to conceal additional earnings from outside employment, petitioner adopted a pseudonym under which he opened an independent bank account. He also obtained a temporary driver's permit and applied for a permanent driver's license under this false identity. In March 1975 this scheme came unraveled when a salesclerk at a Suffolk County store where petitioner was shopping queried petitioner on his identity for reasons unrelated hereto. Evidently concerned that his use of the pseudonym would be discovered, petitioner struggled with the security guard called to the scene, who happened to be an off-duty Suffolk County police officer. This scuffle resulted in petitioner's arrest, and the revelation of his true identity. A 13-count indictment charged petitioner with various counts of assault, forgery of checks signed in his pseudonym, larceny of the purchased merchandise, possession of several checks drawn to the order of the pseudonym, and two counts of criminal possession of a forged instrument in the second degree (the driver's permit and application for permanent license), a Class D felony. The trial court dismissed the check forgery counts and the jury acquitted petitioner of all other charges except for the two counts relating to possession of the allegedly forged driver's permit and application for permanent license. He was sentenced to 60 days on each count. After affirmance by a divided court (67 AD2d 1004), the conviction was ultimately reversed and the indictment dismissed in May 1980 (50 NY2d 302), the Court of Appeals ruling that the elements of criminal possession of a forged instrument

were not present, petitioner having signed his own pseudonym to these documents.

Petitioner thereafter applied for reinstatement to full duty with the New York City Police Department, or at least an opportunity to clear his name. When respondent denied this application, petitioner brought the instant Article 78 proceeding, seeking reinstatement or at the very least a hearing on the question. Respondents' appeal is solely from an interim order granting petitioner a departmental hearing on the issue.

Public Officers Law Sec. 30 subd. 1e provides that a public office shall be considered "vacant" upon the office-holder's "conviction of a felony, or a crime involving a violation of his oath of office." The language of this statute has remained virtually unchanged since enactment of the Public Officers Law nearly a century ago (L.1892, c.681, Sec. 20). Viewing the purpose of the statute as removal of a convicted felon from a position of public honor, rather than actual punishment for his offense, the Court of Appeals ruled more than sixty years ago that "[t]he application of the statute is not defeated by the possibility that the judgment may be reversed." (*Matter of Obergfell*, 239 NY 48.)

The Court of Appeals has more recently had occasion to re-examine this question in *Matter of Toro v. Malcolm* (44 NY2d 146, cert den 439 U.S. 837). There a correction officer's felony conviction was reversed on appeal and he was voluntarily reinstated to his office. The officer's petition for back pay was rejected by the Court of Appeals, which ruled that the Legislature had declared such offices to be vacant upon conviction of a felony, notwithstanding "the possibility that at some future date a former officer's conviction may be reversed" (44 NY2d at p. 150).

That there is a residual sense of harshness and unfairness in a rule that stigmatizes an individual even after his

conviction has been overturned cannot be denied. But we are dealing here with two sets of standards, applicable in disparate circumstances, which should not be confused. The first is the high standard that must be satisfied for serving in a position of public trust, symbolized by the oath of office (see NY Const, art XIII, Sec. 1; Public Officers Law Sec. 10).

The second is the unrelated standard of proof necessary to support a criminal conviction (i.e., beyond a reasonable doubt). Evidence in a particular case may be insufficient to prove a criminal allegation, and yet may still be sufficient to call into question a police officer's moral qualifications for continued public service. Continued occupation in a position of public trust may be thwarted by evidence of conduct which might still be insufficient to support a criminal conviction. As the Court of Appeals noted in *Toro,* a conviction may have resulted from indisputably conclusive evidence of guilt, with reversal warranted due solely to procedural irregularity. While the courts must be "sympathetic to the plight of a truly innocent officer unjustly accused and convicted," we must still be "opposed to establishing a general rule which would provide unjustified relief to others not equally deserving." (*Matter of Toro v. Malcolm, supra,* 44 NY2d at p. 151.) This is not to say that relief would not be available to the unjustly convicted innocent who was completely vindicated on appeal. Nothing prevents a *de novo* application for appointment, or even reinstatement. But the law prohibits automatic reinstatement in such circumstances. Reversal of a conviction and dismissal of an indictment may remove a disability to hold office, but it does not entitle one to automatic reinstatement (*Sroka v. Municipal Civil Service Commission,* 57 AD2d 1064). Discretion in such matters rightfully resides in the governmental agency in which the officer was employed (*Matter of Toro v.*

Malcolm, supra). That agency is charged with maintaining a balance between the rights of an officer who may or may not have been falsely accused of impropriety, and the right of the public to be assured that its officers meet high standards of moral integrity. As to the latter, a "felony conviction, notwithstanding its reversal on appeal, may in many cases shatter this ideal." (*Matter of Toro v. Malcolm, supra,* 44 NY2d at p. 152.)

Petitioner here complains that denial of reinstatement without a hearing deprives him of constitutional due process. We have already held that since a public office is automatically vacated by operation of law upon conviction, there would be no entitlement to a pre-discharge hearing (*Matter of Hodgson v. McGuire,* 75 AD2d 763). *A fortiori,* there is no entitlement to a post-termination hearing on an application for reinstatement. The office having been vacated long before the application for reinstatement, all rights to the office disappeared at that time. Denial of a hearing in conjunction with petitioner's application for reinstatement deprived him of neither liberty nor property, thus negating any claims with regard to constitutional due process (*Greene v. McGuire,* 683 F2d 32).

Order filed.

APPENDIX C—Memorandum Decision of the Supreme Court, New York County (Hon. Richard Lee Price, J.)

Supreme Court of the State of New York, Special Term Part I, New York County at the Courthouse thereof, 60 Centre Street, New York, New York 10007.

Present:
Hon. Richard Lee Price, Justice.

CHARLES BRIGGINS

against

ROBERT J. MCGUIRE

The following papers numbered 1 to 6 read on this motion submitted No. 75 on Calendar of October 31, 1983.

	Papers Numbered
Notice of Motion—Enumerated Papers #1-5 and Affidavits Annexed	1-5
Filed Papers—See Order, Justice Hedda G. Schwartz	6

Upon the foregoing papers this motion is decided in accordance with the accompanying memorandum decision.

Dated: 12-12-83

R. L. P.
J.S.C.

C3

SUPREME COURT

NEW YORK COUNTY

Special Term, Part I

IN THE MATTER OF THE APPLICATION

OF

CHARLES BRIGGINS,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

against

ROBERT J. MCGUIRE, as Police Commissioner of the Police Department of the City of New York, NEW YORK CITY POLICE DEPARTMENT and THE CITY OF NEW YORK,

Respondents.

Index No. 22319/81

PRICE, RICHARD LEE, J.:

In accordance with this court's decision of April 13, 1983, granting this Article 78 petition to the extent of

directing the respondent to file and serve an answer, petitioner now moves to have this action restored to the calendar and determined on the merits.

Respondent's earlier motion to dismiss was granted to the extent of holding that petitioner is not entitled to a court order of reinstatement. The issue before this court now, on the merits, is whether petitioner is entitled to a court-ordered *hearing* on the issue of reinstatement. For the reasons set forth in this court's decision of April 13th, as well as the reasons that follow, the petitioner is found entitled to a hearing in accordance with the mandate and procedures set forth in Civil Service Law 575.

In my April 13th decision I held that the recent second circuit reversal in *Green v. McGuire,* 683 F.2d 32 (1982), revs'g 517 F. Supp. 1330 (S.D.N.Y. 1981), does not compel this state court to find that a police officer whose felony conviction is reversed on the grounds that no crime has in fact been committed is not entitled to an otherwise statutorily required hearing. My conviction on this issue has not changed.

Although my decision has not changed, I am not without appreciation for respondent's position. Respondents maintain that (in addition to the automatic, permanent vacatur of state office resulting from a felony conviction) petitioner is not entitled to a departmental hearing for two strong reasons:

(1) the conduct underlying the petitioner's conviction, even if not criminal, was certainly suspicious and questionable, and

(2) charges and speculations pending against petitioner at the time of his conviction (based upon different and distinct alleged criminal acts) indicate petitioner's unworthiness as a police officer.

All the allegations and suspicions aimed at and regarding petitioner may be well-founded and petitioner may indeed be unworthy of the vaulted position of police officer. Nor does this court deny that respondents have carefully weighed petitioner's motion for reinstatement, (even to the point of allowing oral argument.) But respondents have weighed that motion within their own interpretation of the law as they see it, and unfortunately I believe that interpretation is incorrect.

Petitioner is entitled to a hearing with respect to both the acts underlying the conviction and the acts underlying the pending charges and specifications. The facts that the acts underlying the conviction were not considered a crime will not prevent the respondents from discharging the petitioner. It is a well-settled principle of law that police officers must live up to a level of behavior and morality that the rest of society is not held to. See *Perry v. Blair,* 64 App. Div. 2d 870, 407 N.Y.S.2d 371 (4th Dept. 1978).

Similarly, there is nothing to prevent respondents from discharging petitioner if the acts underlying the charges and specifications are substantiated as having occurred. But this court will not permit respondents to bolster their claim of permanent forfeiture with allegations of other, unproven misdeeds. It is to prevent this very type of administrative action that Civil Service Law §75 (as well as due process requirements in general) was created. A mere "review of [petitioner's] service record" is insufficient as a matter of law.

So stated, this court holds that where a permanent civil service employee is discharged by operation of Pub. Off. Law §30(e) as the result of a felony conviction, but that conviction is reversed on the basis that no crime was in fact committed, the employee is entitled as a matter of law to a post-termination hearing in accordance with CSL §75 to determine if the employee should be reinstated. The

standards to be utilized in this determination are the same as those that are used to determine if an employee should be discharged in the first place.

Petition granted to the extent of remanding the matter to the respondents for hearing and determination in accordance with this decision.

Settle judgment.

Dated: December 12, 1983

RICHARD LEE PRICE
J.S.C.